

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

FONTEM US, LLC,

Petitioner,

v.

U.S. FOOD AND DRUG ADMINISTRATION,

Respondent.

No. 23-1212

PUBLIC PROTECTIVE PETITION FOR REVIEW

Pursuant to 5 U.S.C. § 706, 21 U.S.C. § 387l(a), and Federal Rule of Appellate Procedure 15(a), Fontem US, LLC (Fontem) hereby petitions this Court for review of the Marketing Denial Order, dated July 10, 2023, issued by the United States Food and Drug Administration (FDA). The Marketing Denial Order denies Fontem's Premarket Tobacco Product Application for Fontem's electronic nicotine delivery system (ENDS) product, myblu Menthol 2.4%. A copy of the Marketing Denial Order is attached to this petition as Exhibit A. Venue is proper in this Court pursuant to 28 U.S.C. § 2343 and 21 U.S.C. § 387l(a)(1).

Under the Federal Food, Drug, and Cosmetic Act (FDCA), as amended by the Family Smoking Prevention and Tobacco Control Act (Tobacco Control Act), any tobacco product that was not commercially marketed as of, or which was modified after, February 15, 2007 must receive a marketing order from FDA prior to being

commercially marketed in the United States. 21 U.S.C. § 387j. In 2016, FDA enacted a rule that deemed electronic nicotine delivery system products that contain nicotine derived from tobacco subject to regulation as “tobacco products.” 81 Fed. Reg. 28973 (May 10, 2016) (codified at 21 C.F.R. § 1143.1). Because certain electronic nicotine delivery system products were already on the market prior to introduction of that rule, FDA provided staggered deadlines for meeting various FDCA requirements for tobacco products. 81 Fed. Reg. at 29009-15. If a new tobacco product does not comply with the premarket requirements of the Tobacco Control Act, FDA considers the product to be “adulterated.” 21 U.S.C. § 387b(6)(A); 21 U.S.C. §§ 331-33.

Fontem is petitioning for review of the Marketing Denial Order issued by FDA on July 10, 2023. *See* Exhibit A. In that order, FDA determined that Fontem’s reviewed product “lack[ed] sufficient evidence to demonstrate that permitting the marketing of the product” is “appropriate for the protection of the public health.” *Id.* at 1. The order violates the Administrative Procedure Act because it is contrary to law and arbitrary and capricious. 5 U.S.C. § 706. Fontem respectfully requests that the Court, on review, vacate or modify, in whole or in part, the foregoing order and also requests that the Court grant such further relief as may be deemed just and proper, including such relief as necessary to ensure that it may continue to market the products subject to the challenged order.

The Tobacco Control Act provides that judicial challenges to certain FDA orders with respect to tobacco products must be brought within 30 days. *See* 21 U.S.C. § 387l(a)(1). At the same time, FDA’s regulations explicitly provide for a process of “supervisory review.” 21 C.F.R. § 10.75(a) (“A decision of an FDA employee, other than the Commissioner, on a matter, is subject to review by the employee’s supervisor”). Fontem hopes to resolve the issues addressed in the Marketing Denial Order through FDA’s internal supervisory review process, and is in the early stages of pursuing such review. Out of an abundance of caution, however, due to the statutory deadline contained in the Tobacco Control Act, Fontem files this petition for review to protect its right to judicial review of the order.

Dated: August 8, 2023

Respectfully submitted,

/s/ Andrew D. Prins

Philip J. Perry

Andrew D. Prins

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RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, petitioner Fontem US, LLC (Fontem) respectfully submits the following corporate disclosure statement:

Fontem is a nongovernmental North Carolina limited liability corporation engaged in the manufacture of e-liquids for use in electronic nicotine delivery systems. Fontem's sole member is ITG Brands Holdpartner LP, a North Carolina limited partnership. ITG Brands Holdpartner LP has two partners: ITG Brands Holdco LLC, a North Carolina limited liability corporation, and ITG Holdings USA Inc., a Delaware corporation. ITG Holdings USA Inc. is wholly owned by Imperial Brands PLC. Imperial Brands PLC (LSE:IMB) is a publicly traded United Kingdom public limited company. No publicly-held company has a 10% or greater ownership interest in Imperial Brands PLC.

Dated: August 8, 2023

Respectfully submitted,

/s/ Andrew D. Prins

Philip J. Perry

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Counsel for Fontem US, LLC

EXHIBIT A

Marketing Denial Order, dated July 10, 2023

NOT PUBLICLY AVAILABLE
MATERIAL DELETED

CERTIFICATE OF SERVICE

Pursuant to Federal Rules of Appellate Procedure 15(c) and 25(d), I hereby certify that on August 8, 2023, a true and correct copy of the foregoing was served on the following by electronic mail and U.S. Postal Service first class mail, in addition to filing the Petition for Review electronically with the Clerk:

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